In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 293

ANDREW PASHA, PETER GRAFNER, AND ARTHUR MONACO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 332 F. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1964. A petition for rehearing was denied on June 17, 1964. The petition for a writ of certiorari was filed on July 17, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether officers who, on executing a warrant for the search and seizure of gambling paraphernalia,

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answered telephones at the premises being searched could testify regarding the telephone conversations.

2. Whether there was probable cause for the issuance of a search warrant.

3. Whether the willful failure to file a wagering tax "return" is an offense punishable by a term of imprisonment.

STATEMENT

Petitioners were convicted in the Northern District of Illinois on a two-count indictment charging them with engaging in the wagering business between April 25 and April 27, 1960 in violation of 26 U.S.C. 7203. Count 1 charged that petitioners willfully failed to pay the special tax on wagering. Count 2 charged that they willfully failed to register and file a wagering tax return (A. 11–12).[1] Each petitioner was sentenced to imprisonment for concurrent one-year terms and fined $1,000 on each count (A. 216–220).

The evidence may be summarized as follows:

In September 1959, petitioner Monaco rented a three-room apartment at 3157 North Leclaire (A. 101, 105). In November 1959, petitioner Pasha, using the alias Sidney Goodman, rented a store at 5129 West Diversey and opened a bank account for Goodman Design and Engineering Company (A. 93, 100), the name placed across the front window of the store (A. 98). The apartment was under surveillance by federal agents during the last week of March 1960 (A. 83–87, 103), and the store was watched between April 20

[1] "A." refers to petitioners' appendix in the court of appeals.

and April 26, 1960 (A. 98–99, 103–104). Petitioners were observed entering and leaving.

On April 27, 1960, acting under a search warrant, federal agents conducted a search at the apartment. Petitioners Pasha and Grafner were present, and petitioner Monaco entered during the raid. Betting slips, scratch sheets, racing forms and three telephones were found in the apartment (A. 105–110, 121). An expert said the paraphernalia was the type used in a wagering-layoff center (A. 158–160, 169–170). Later in the day, a second search warrant was executed at the store. Blank betting paraphernalia, a scratch sheet and three telephones were found in its rear room. The front of the store was vacant except for a disconnected telephone (A. 106–109). Petitioners had not complied with the federal wagering tax provisions (A. 146).

While in the apartment executing the warrant, Agents Homa and Crusor were assigned to answer the telephones, and they received twenty-six calls in an hour (A. 87, 90, 137). Homa identified himself to some callers as "Andy," and one party inquired, "What happened in the first at Keenland?" Another caller responded, "I heard there is a general raid all over the country, the G.'s. * * * They got a guy in New Orleans." Other callers hung up after Homa identified himself as "Andy," "Pete," or "Number ten" (A. 91–92). Another caller told Crusor, "Eighth at New York. No. 12, World Ruler, ten across." Another party asked for the results of two races (A. 140–142).

Petitioners objected to the admission of the contents of these conversations on the ground that the search warrant did not authorize the agents to receive any telephone calls and that such action violated petitioners' constitutional rights under the Fifth Amendment. Petitioners also contended that the conversations constituted hearsay. The objections were overruled by the trial court (A. 88–89, 137, 140, 142).

ARGUMENT

1. Petitioner's belated claim that the evidence of the telephone conversations was illegally obtained under Section 605 of the Communications Act because Agent Homa misrepresented his identity to the callers was properly rejected by the court of appeals. In the first place, the specific objection was never made at trial. Petitioners there contended only that all testimony relating to the telephone calls—whether or not obtained by deceit—should be excluded on the grounds (1) that the agents' conduct was not authorized by the search warrant and (2) that it was hearsay. The second of these grounds has been abandoned in this Court, and the first—which appears to be the basis of petitioner's second ground for certiorari (Pet. 27–30)—is without merit. The agents were lawfully upon the premises and their search warrant authorized them to search for and seize "telephones" as well as "other tools, instruments, apparatus, receptacles and records, relating to the business of accepting wagers" (A. 42). Thus, there can be no claim that they interfered with property

with which they were not authorized to deal. Nor did they intrude upon any protected Fourth Amendment right. The calls were communications to a place where the agents had a right to be, and they were made by means of an instrumentality used in carrying on the wagering business which was the basis of the offense for which petitioners were arrested. The messages were entitled to no greater protection than personal communications among petitioners overheard by the agents in the course of their lawful search (see A. 92). As indicated in *Abel* v. *United States,* 362 U.S. 217, 238, an article which comes into an officer's possession in the course of a search need not be returned merely because it was an unanticipated find. The same rule is applicable here even though the evidence was a verbal statement rather than "an article." *Wong Sun* v. *United States,* 371 U.S. 471, 484–487.

Moreover, the agents' conduct did not violate the Communications Act. Being lawfully present in the apartment, the agents could become parties to a telephone conversation within the meaning of the Communications Act although they were not the subscribers in whose names the telephones were listed. Hence their acts did not amount to "interceptions" within the meaning of Section 605. *Billeci* v. *United States,* 184 F. 2d 394 (C.A. D.C.). Nor did the misrepresentation of their identity violate the Act. As this Court observed in *Sherman* v. *United States,* 356 U.S. 369, 372, "[c]riminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." The police may

represent themselves to be criminals if they are assigned as undercover agents. Just as a person who transfers narcotics face-to-face assumes the risk that his customer may be an undercover agent, so does a gambler using a telephone risk being deceived as to the identity of the other party to his telephone conversation. Each may choose not to deal with persons who are not known to him or whose voice he cannot recognize. The use of the telephone does not provide a shield against decoys.

In any event, petitioners were not parties to the telephone conversations and should not, therefore, be heard to object to their admissibility. As this Court held in *Goldstein* v. *United States*, 316 U.S. 114, 122, even testimony procured by unlawfully intercepted telephone communications is not to be rendered inadmissible "against a person not a party to the message."

2. Two search warrants, one covering the apartment and the other the store, were issued. Probable cause was shown primarily by the affidavit of an Internal Revenue Agent who supervised the investigation. In detailing the facts, this agent stated that telephone company records showed that long-distance telephone calls had been made to the apartment from a Milwaukee phone listed in the name of a known gambler, that long-distance telephone calls made to the apartment from New Orleans and to the store from New Orleans and Miami had been charged to a credit card which had been used for many telephone calls to numbers listed in the names of known gamblers or bookmakers. The affidavit stated that the sources of its

information that such telephones were assigned to bookmakers and gamblers were reports of Internal Revenue officials in Milwaukee, Jacksonville and Louisville and information on file in the office of the District Director in Chicago. The affidavit also stated that agents under the supervision of the affiant had observed the petitioners enter and leave the apartment and store at regular hours (A. 31–41; Pet. 10–20).

The affidavit provided adequate facts to establish probable cause. The information that telephone calls were made to and from gamblers came from Internal Revenue officials in four enumerated cities. Although this was hearsay, the fact that four different sources each reported that numbers called on the credit card were listed in the names of known gamblers provided "a substantial basis for crediting the information." *Jones* v. *United States,* 362 U.S. 257, 269.[2] Since the sources of the information were revealed, this case is not in conflict with *Ventresca* v. *United States,* 324 F. 2d 864 (C.A. 1), certiorari granted June 22, 1964, No. 28, this Term, where the majority of the court of appeals held (erroneously in the government's view) that a supporting affidavit was insufficient if it did not disclose the source of the agent's information.

The agent's statement that he had "reason to believe" that gambling paraphernalia was on the premises was based—as the affidavit on its face disclosed—

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[2] *Aguilar* v. *Texas*, No. 548, O.T. 1963, decided on June 15, 1964, is not in point because the affidavit there did not set forth any supporting facts.

on his reasonable belief that the premises were being used for gambling. There is no requirement that the agent personally see any such property being brought upon the premises if he has a reasonable basis for his belief that it is there. It was sufficient that the detailed facts alleged provided a substantial basis for the Commissioner to conclude that such paraphernalia was probably present. *Jones* v. *United States,* 362 U.S. 257.

3. Petitioners were sentenced to concurrent one-year terms of imprisonment and fined an additional $1,000 under count 2 under a charge that they willfully failed to register and file a wagering tax return. The sentence on the second count was lawful. Section 6011(a) of the Internal Revenue Code provides that the Secretary of the Treasury may require by regulation that a taxpayer file a return; a regulation requiring such returns for wagering occupational taxes was duly issued. Section 7203, under which petitioners were prosecuted, provides that any person required to pay a tax, or "by regulations made under authority thereof to make a return" who willfully fails to do so, is subject to the criminal penalty. Hence the punishment was expressly authorized by Congress. See *Viereck* v. *United States,* 318 U.S. 236, 241.

Petitioners were properly sentenced under Section 7203 since they were convicted of a "willful" failure to file a return. Section 7272, on which petitioners rely (Pet. 34–35), has no application. It provides penalties for non-willful failures to register. Nor is

United States v. *Carroll*, 345 U.S. 457, in point. The issue there was whether each separate failure to file informational returns in a calendar year constituted a separate punishable offense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

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